United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1259

To be argued by
Jeffrey Waller

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

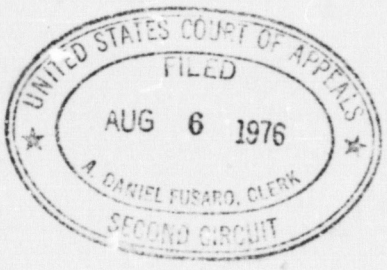
ANTHONY CONTRERAS, et al,
Defendants-Appellants.

*****

On Appeal From The United State District Court
For The Eastern District of New York

*****

BRIEF FOR THE APPELLANT, JOSEPH DiGISO



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PRELIMINARY STATEMENT

Joseph DiGiso appeals from a judgment entered in the United States District Court for the Eastern District of New York (Platt, J.) on June 4, 1976, convicting him of two counts of theft of goods from interstate commerce, two counts of possession of goods stolen from interstate commerce and one count of conspiracy to steal and possess goods from interstate commerce.

After an eight day trial a jury found DiGiso guilty as charged and he was thereafter sentenced to five concurrent eight-year terms of imprisonment.

STATEMENT OF FACTS

See Statement of Facts in Brief of Appellant Contreras

ISSUES PRESENTED

1. Where there is evidence presented at the trial from which a jury might find that a multiple conspiracy existed, did the District Court commit error by failing to charge the jury that they must determine whether there was a single or a multiple conspiracy?

2. Where a conspiracy is charged, did the District Court commit error by failing to charge the jury that the government must establish a specific intent to violate the substantive statute, but instead merely charged that a person is presumed to intend the natural and probable consequences of his acts?

3. Where there is no evidence presented at trial concerning recent possession of alleged stolen property, other than the testimony of an accomplice-informer, did the District Court commit error by charging the jury that they may find that a person in possession of recently stolen property knew the property had been stolen?

4. Where the District Court allowed into evidence testimony of alleged criminal activity which occurred after the termination of the alleged conspiracy was error committed?

5. Where the defendant was charged with both the larceny of goods and also the criminal possession of these same goods, was it error for the District Court to fail to charge the jury that the defendant may not be convicted of both the

larceny and the criminal possession, but may only be convicted of one of these crimes?

ARGUMENT

POINT ONE

THE DISTRICT COURT COMMITTED ERROR BY FAILING TO CHARGE THE JURY THAT THEY MIGHT FIND THE EXISTENCE OF MULTIPLE CONSPIRACIES

There can be no doubt that where an indictment charges one overall conspiracy and the proof adduced at trial shows a series of smaller conspiracies, there is a material variance, and the conviction must be reversed. United States v. Bertolotti, 529 F.2d 149 (CA2 1975).

Count five of the instant indictment charges the four defendants with one conspiracy to steal and possess four shipments of goods from interstate commerce. However, the first four substantive counts of the indictment, which deal with two of the alleged thefts and possessions of goods, apparently deal with two sets of "conspirators": Di Giso, Contreras and Berrada in the first two counts, and Di Giso, Berrada and Dominici in the second two counts.

If charged on the concept of multiple conspiracy, the jury might well have found that separate, distinct conspiracies existed for each of the alleged thefts. However, the district court merely charged the jury that there may be two separate conspiracies -- one to steal and the other to possess. This was error in itself because a conspiracy can include an agreement to commit one or more substantive crimes.

In light of the evidence presented at the trial, it was possible for the jury to find that there was a separate and distinct conspiracy for each of the four theft-possessions alleged in the indictment. It is submitted that the defendant was prejudiced by the admission of evidence in regard to one or more conspiracies that the jury might well have determined that the defendant did not play a part. The defendants requested that the district court charge the jury:

> "The government has charged a single conspiracy. The defendant have tried to show that there was more than one conspiracy. It is for you to determine whether there was a single conspiracy or more than one conspiracy. If you find that there were more than one conspiracy, then you can find guilt of the conspiracy only against the persons who were members of **all** the conspiracies. If you find that a defendant was a member of one conspiracy and not of the others then you must find that defendant not guilty. It is for you to determine whether there was a single conspiracy or more than one conspiracy and it is for you to determine if a defendant was a member of only one conspiracy or more than one conspiracy." (A-29)

The district court declined to do so. This failure prohibited the jury from considering the existence of more than one conspiracy.

POINT II

THE DISTRICT COURT COMMITTED ERROR IN ITS CHARGE CONCERNING THE SPECIFIC INTENT NECESSARY TO PARTICIPATE IN A CONSPIRACY

The law is clear that where a conspiracy is charged in an indictment, the government must establish a "specific" rather than a "general" intent to violate the substantive statute beyond a reasonable doubt. United States v. Crimmins, 123 F. 2d 271 (CA2 1941); United States v. Cangiano, 491 F. 2d 906 (CA2 1974), cert. denied, 419 U.S. 904 (1974)

The district court, in charging the jury as to the intent necessary to participate in a criminal conspiracy, stated: "It is ordinarily reasonable to infer a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." (p. 1101)

The above charge lessens the degree of proof needed to convict the defendant of conspiracy and as such it is respectfully submitted constitutes reversible error, particularly in light of this Court's recent warning:

"We wish ,.. to take this opportunity to again stress our disapproval of the 'natural and probable consequences' charge and to remind trial judges that its continued use may jeopardize otherwise sound convictions." United States v. Bertolotti, supra, at p. 159.

POINT III

THE DISTRICT COURT COMMITTED ERROR BY CHARGING THE JURY AS TO "RECENT POSSESSION" OF STOLEN PROPERTY WHEN THERE WAS NO EVIDENCE ADDUCED AT THE TRIAL CONCERNING SUCH POSSESSION.

The district court charged the jury that the defendant's possession of property recently stolen was a basis for the jury finding that said defendant knew the property had been stolen (pp 1079-1080).

The "recent possession" charge is a standard one used mainly in those cases where the police or other law enforcement officials arrest a defendant in actual possession of stolen property shortly after the theft of said property.

However, it is submitted that under the facts and circumstances of the instant case the "recent possession" charge constituted improper bolstering of the witness' testimony and therefore was error.

In this case, it was only the testimony of accomplice-witnesses that the defendant possessed stolen property. None of the property was ever recovered by law enforcement officials. Thus the district court charged the jury that they might form an inference -- that the defendant knew the property was stolen -- merely from the testimony of an accomplice, the weakest kind of testimony. This, in effect, lightened the burden of proof necessary to convict the defendant in a patently unfair manner.

POINT IV

THE DISTRICT COURT COMMITTED ERROR IN ALLOWING INTO EVIDENCE TESTIMONY OF CRIMINAL ACTIVITY WHICH OCCURRED SUBSEQUENT TO THE TERMINATION OF THE ALLEGED CONSPIRACY

According to the indictment in this case, the alleged conspiracy began on April 1, 1973, and ended on July 1, 1973. Nevertheless, the district court allowed the accomplice witness Tavolacci to testify that on July 16, 1973, more than two weeks after the alleged conspiracy had terminated, he, along with defendants Contreras and DiGiso had just returned from an unsuccessful attempt to locate a truck to hijack. (90, 99-100).

The above testimony was admitted under the "similar acts doctrine" of Rule 404(b) of the Federal Rules of Evidence, which states that evidence of other crimes is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) merely codified what had been the case law for many years. United States v. Warren, 453 F. 2d 738, (CA2), cert. denied, 406 U.S. 944 (drugs seized after filing of indictment admitted to show intent); United States v. Bermudez, 526 F. 2d 89 (CA2 1975) (narcotics found six weeks after end of conspiracy admitted as proving the existence of a conspiracy and the state of defendant's mind); Lutwak v. United States, 344 U.S. 604 (1953) (in a conspiracy involving fraudulent marriages, post-conspiracy conduct was admitted

which showed the false character of the marriages and the fraudulent intent of the defendants).

It is respectfully submitted that in the instant case the testimony of "similar acts" of the defendants was introduced solely for the purposes of attacking the character of the defendants rather than for any legitimate purpose.

The "similar acts" evidence did not involve any seizures of property by law enforcement officials, but merely the testimony of Tavolacci, who also testified as to the as to the two thefts mentioned in the substantive counts of the indictment, and two other thefts legitimately within the confines of the time limits of the conspiracy.

For the district court to allow Tavolacci to testify as to acts allegedly occurring after the conspiracy ended unfairly prejudiced the defendants by bolstering the credibility of the suspect accomplice witness.

If these defendants are to be convicted because the jury believes Tavolacci's testimony (and it should be noted here that one defendant, Dominici, about whom Tavolacci testified, was acquitted of all counts), then so be it. But Tavolacci's testimony about subsequent criminal activity added nothing to the proof of motive, opportunity, etc. The testimony merely attacked the character of the defendants and suggested to the jury that these defendants were so criminally minded that they continued their criminal activity even after the conspiracy was offically terminated.

POINT V

THE CONVICTION OF THE APPELLANT FOR BOTH THE CRIMES OF LARCENY AND POSSESSION OF STOLEN PROPERTY WAS DUPLICITOUS AND CONSTITUTED ERROR

Defendant DiGiso was convicted of the theft of goods from interstate commerce and the criminal possession of the same goods on May 7, 1973 (Counts 1 and 2); and the theft of other goods from interstate commerce and the criminal possession of these same goods on June 28, 1973.

It is respectfully submitted that the District Court was in error in not charging the jury that the defendant could not be found guilty of both the larceny and possession of goods, and that the jury's verdict was duplicitous.

The holdings of the United States Supreme Court are clear that an individual cannot be convicted both of larceny and criminal possession of the same goods, and that the jury should have been so instructed. Heflin v. United States, 358 U.S. 415 (1959); Prince v. United States, 352 352 U.S. 322 (1957).

POINT VI

PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 28(i) APPELLANT DiGISO ADOPTS THOSE POINTS AND ARGUMENTS ADVANCED BY HIS CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM

CONCLUSION

For the above-stated reasons the judgment appealed from must be reversed and the indictment dismissed, or alternatively there must be a new trial.

Respectfully submitted,

JEFFREY WALLER
Attorney for DiGiso

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF New York } SS.:

Floristeane Anthony
being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age

That on the 6th day of August 19 76
deponent served the within appellant's brief

upon Steven Kimmelman
Ass't United States Attorney
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in – a post office – official depository under the exclusive care and custody of the United States post office department within New York State.

Floristeane Anthony

Sworn to before me,

this 6th day of August 19 76

Paul C. Warnke, Jr.
NOTARY PUBLIC, State of New York
No. 52-9529400
Qualified in Suffolk County
Commission Expires March 30, 19